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SUPREME COURT U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

AUGUST CLIFF, *Plaintiff in Error,*
vs.
THE UNITED STATES.

No. 19.

REPLY TO SOLICITOR-GENERAL'S "SUGGESTION RESPECTING PETITION FOR REHEARING."

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

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SUGGESTION RESPECTING PETITION FOR REHEARING.

The Solicitor-General respectfully brings to the attention of the court the fact that the fine of $50 imposed in this case, with the costs, $19.15, were duly paid by the plaintiff in error, Cliff, to the clerk of the court in which the conviction was had, on February 28, 1905, and that such fine and costs have been duly covered into the Treasury of the United States, as shown by the following letter from the Acting Commissioner of Internal Revenue:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, May 11, 1905.

The SOLICITOR-GENERAL,
Department of Justice,
Washington, D. C.

SIR: Referring to the case of the *United States* v. *August Cliff*, being an indictment in the United States District Court for the Northern District of Illinois for violation of section 11 of

the act of August 2, 1886, as amended by section 3, act of May 9, 1902, I have the honor to state, in response to a verbal inquiry made by Special Assistant Attorney Lott of your office, that the records of this office show that the sum of fifty dollars ($50.00) fine imposed in this case, and the further sum of nineteen dollars and fifteen cents ($19.15), costs, making a total of sixty-nine dollars and fifteen cents, were paid over to Henry L. Hertz, esq., collector First District of Illinois, by T. C. McMillan, esq., clerk of the United States District Court, Northern Judicial District of Illinois, on February 28, 1905, and that the said amount of sixty-nine dollars and fifteen cents ($69.15) has been covered into the Treasury of the United States, as shown by the report made to this office on form 58 by Collector Hertz, for the month of February, 1905.

Respectfully,

ROBT. WILLIAMS, Jr.,
Acting Commissioner.

The Solicitor-General submits that by reason of the payment of the fine and costs the case has been finally settled, and only a moot question is presented by the petition. As said by this court in *Kimball* v. *Kimball* (174 U. S., 158, 161), Mr. Justice Gray delivering the opinion:

> The court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it.

To the same effect is the case of *Tyler* v. *Judges, etc.*, 179 U. S., 405, 409; *Hatfield* v. *King*, 184 U. S., 162, 165.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

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Not knowing how far the court's denial of the petition for rehearing in this case was predicated upon the printed suggestion filed by the Solicitor-General, the writer ventures to present a brief reply and to ask that it have such consideration as the court may deem fit.

It is quite true, as stated by the Solicitor-General (quoting from the court's opinion in *California* v. *San Pablo & Tulare Railroad*, 149 U. S., 308, 314, cited with approval in *Kimball* v. *Kimball*, 174 U. S., 158, 161) that

> "The court is not empowered to decide moot questions, or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

But the writer respectfully submits that the Solicitor-General is mistaken in thinking that by reason of the payment of the judgment for penalty and costs, this case has been *finally* settled and that "only a moot question is presented by the petition."

What has occurred since this court handed down its decision of this case early this term appears from the following certificate:

> "IN THE DISTRICT COURT OF THE UNITED STATES,
> For the Northern District of Illinois.
>
> I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, DO HEREBY CERTIFY that a mandate issued out of the Supreme Court of the United States on February 11, A. D. 1905, in the case of August Cliff, plaintiff in error, *vs.* The United States, defendant in error, was filed in the

District Court of the United States for the Northern District of Illinois by leave of Court on the 23rd day of February, A. D. 1905, and *thereafter* on the 28th day of February, A. D. 1905, said August Cliff, defendant in said case in said District Court of the United States, paid the judgment therein against him for the penalty of Fifty dollars and for costs amounting to nineteen and 15/100 dollars, and on the same day I paid over the sum of Sixty-nine and 15/100 dollars, being the amount of said judgment for penalty and costs to Henry L. Hertz, Esq., Collector of Internal Revenue for the First District of Illinois.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this nineteenth day of May, A. D. 1905.

Seal of Dist. Court U. S. Northern Dist. Illinois 1855.

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois."

Payment of the judgment having been made by the defendant Cliff after the mandate of this court was filed in the lower court, the gist of the Solicitor-General's contention now is, that if this court should grant a rehearing, and upon re-argument should reverse the judgment of the lower court, such reversal could not be carried into actual effect,—in other words, that, having paid the penalty and costs adjudged against him by the lower court, the plaintiff in error could have no relief. The Solicitor-General has not stated why he considers that a reversal could not be made effective. But it may be inferred that, inasmuch as the record does not show that any execution was issued, the payment of the penalty and costs by the plaintiff in error is regarded by the Solicitor-General as a voluntary acquiescence in the judgment regardless of whether the court should thereafter hold it to be erroneous. Not only do the cases cited by the Solicitor-General wholly fail to sustain that view, but the decisions of this and other courts and the weight of reason are directly opposed to it.

Under rule 39 of this court the mandate issued as of course any time after thirty days from the day the judgment of affirmance was entered. The mandate when filed in the lower court nullified the supersedeas and the judgment be-

came immediately enforcible with the same but no greater effect than if there had been no supersedeas. Its enforcement, unless error had been waived by the plaintiff in error, was subject to the power of this court during this term to recall its mandate, reverse the judgment and require or enable restitution. For rule 30 of this court allows the plaintiff in error to present a petition for rehearing at any time during this term; and it would be nothing short of a solecism if obedience to this court's mandate, issued pursuant to one rule of this court, were held to prevent enjoyment by the plaintiff in error of his right to have the court consider on its merits his petition for rehearing duly filed under another rule of this court.

The pivotal question therefore seems to be:

Did the payment by plaintiff in error of the judgment for penalty and costs against him, after the filing of the mandate of this court, constitute a voluntary payment in such sense as to deprive plaintiff in error of the right to have the amount paid back to him in case the judgment were thereafter held by this court to be erroneous? To this question the decisions of this and other courts give plain answer in the negative.

Dakota County v. Glidden, 113 U. S., 222, was a motion to dismiss a writ of error. The suit was on county bonds issued in aid of a railroad. Judgment having been rendered below for the plaintiff, the defendant county brought a writ of error to reverse it. Subsequently to the judgment and while the writ of error was pending, the county made a *compromise* settlement with the plaintiff and other bondholders by giving them new bonds bearing a less rate of interest, and the old bonds, which were the cause of action in the suit, were surrendered and destroyed. These facts were shown to this court by affidavits and transcripts from the county records, in support of the motion to dismiss. The court, speaking by Mr. Justice Miller, said:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a

writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other respect, *its right to prosecute this writ of error would have remained unaffected.*"

Freeman in his work on Judgments (4th ed., § 482) says:

"Upon the reversal of the judgment against him, the appellant is entitled to the restitution from the respondent of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary in specie; not the *value*, but the *thing*. If money has been collected by the plaintiff in the judgment, *whether under execution or not, an action lies against him to recover it back.*" Citing *Scholey* v. *Halsey*, 72 N. Y., 578; *Ex-parte Walter Bros.*, 89 Ala., 237.

In *Scholey* v. *Halsey* the plaintiff had paid money and the defendants had received it after a hearing and decision of the Surrogate that the defendants were entitled to it. No execution was issued. Later the Surrogate's decision was reversed and an action was brought by the plaintiff to recover the money he had paid. The court, speaking by Andrews, J., said:

"The original decision of the Surrogate was doubtless erroneous, and having been subsequently reversed and set aside, the plaintiff was then entitled to recover the money paid under the erroneous order. * * * And it is not necessary in order to maintain the action that the payment should have been coerced by execution. *It is sufficient if it was paid after judgment or adjudication made.* 1 Starkie, 326, 357; *Lott* v. *Swezey*, 29 Barb., 87. The original defendants were bound therefore to restore to the plaintiff the money received under the erroneous decision of the surrogate."

Ex-parte Walter Bros., 89 Ala., 237, was an application for a writ of mandamus directed to a chancellor commanding him to make or show cause why he should not make an order requiring the plaintiff in an original suit to repay the defend-

ants a sum of money which they had paid (without execution) on a decree against them, which decree was afterward reversed on appeal. The court said:

> "We are unable to concur with counsel who appear against the application, that money paid on and in obedience to a decree of the chancery court can, in any case, be said to be paid voluntarily, in such sort as to preclude its recovery in the event of a reversal of the decree. We understand the law to be settled to the contrary." Citing among other cases *Scholey* v. *Halsey, supra; Hiler* v. *Hiler,* 35 Ohio St., 645.

Hiler v. *Hiler, supra,* was a suit to recover money paid by the plaintiff upon a judgment previously rendered against him but subsequently reversed. No execution had been issued on the judgment. The defense was that the payment was voluntary. In sustaining the right of recovery the court, among other things, said:

> "But it is said the payment was voluntary, and therefore Jacob J. Hiler is not entitled to recover. We do not find it necessary to determine what constitutes such voluntary payment of a judgment as will preclude the party paying from recovering back the money paid. An objection like that goes to the question whether the original judgment should have been reversed, and that question is not before us. As the objection is now presented, it is well answered in the language of Lewis, C. J., in *Breading* v. *Blocher,* 29 Pa. St., 347. 'A judgment of restitution given upon a reversal of an erroneous judgment, is conclusive of the matters adjudged by it. It establishes beyond further question the right of the plaintiff in error to be restored in all things which he has lost by reason of the erroneous judgment.' "

In *Converse* v. *Sickles,* 74 Hun, 429, which was brought to recover money paid on a legal judgment *which had not been reversed or set aside,* the court, speaking by Parker, J., said:

> "The general rule is that money paid in satisfaction of a legal judgment cannot be recovered back, though not justly due from the defendant.
>
> *An exception to the rule* is where money is paid in satisfaction of an erroneous judgment, which is subsequently reversed or set aside. In such case the money paid may be recovered back." (Citing cases.)
>
> "And it is not necessary in order to maintain the action

that the payment should have been coerced by execution. *It is sufficient if paid after judgment.*" Citing *Lott* v. *Swezey*, 29 Barb., 87; *Scholey* v. *Halsey, supra; Peyser* v. *Mayor*, 70 N. Y., 497.

In *Peyser* v. *Mayor, supra,* in holding that an assessment for a local improvement, regular upon its face, has the force of a judgment, and that a party paying such an assessment does not pay voluntarily but under coercion of law and could therefore maintain an action upon the subsequent setting aside of the assessment, the court, speaking by Folger, J., said among other things:

> "Coercion by law is where a court, having jurisdiction of the person and subject matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted, he may as well pay the amount at one time as at another and save the expense of delay."

In *Tripler* v. *Mayor*, 125 N. Y., 617, which was a suit to recover money paid on a *void* assessment for taxes, the recovery was denied because the court found that the plaintiff had had constructive notice of the facts which rendered the assessment absolutely void, but the court, speaking by Peckham, J., approved the doctrine announced in *Peyser* v. *Mayor*, in the opinion of Folger, J.

In *Lott* v. *Swezey, supra*, after discussing various cases, the court, speaking by Emott, C. J., said:

> "These cases are all of them in point to show that the remedies are cumulative, and that the action will lie. I think that they also sustain the position that where money has been collected *or received upon a judgment valid at the time* and binding between the parties, and that judgment has been reversed subsequently, the money may be recovered back, although the payment may not have been coerced by actual duress. We ought not to say that a party must resist the judgment of a court to the last extremity and with what is something like contumacy, if he wishes to preserve his right to restitution in case he succeeds in reversing the judgment. Where a man pays without coercion and with knowledge of the facts of his case, he cannot be heard afterward to say that upon these facts he ought not to have been called upon for payment.

That is undoubtedly the settled rule of law. But that supposes that he claims restitution upon the same state of facts which existed when he paid the money. *When, however, the payment is paid in obedience to the judgment of a court which had determined that he must pay it, and his adversary had the right to demand it of him,* and subsequently a legal tribunal of competent authority adjudges that the first judgment was erroneous, and therefore vacates and reverses it, the conclusion is irresistible that the plaintiff in the first judgment, if he has received its amount, has received what he is equitably and justly bound to restore. The court ought not to refuse its aid to compel such restitution." * * *

"The distinction between such a case, and those where actual duress is required to be shown is that in the latter the plaintiff has paid a demand which was wrongful at the time and he is foreclosed from showing its wrongfulness afterwards unless he was compelled to pay it; *while here the demand was rightful at the time, and so long as the original judgment remained unreversed.* The obligation of the defendant to restore the money was created subsequently when the judgment was reversed, and it is upon that state of facts and that too produced by judicial action that the plaintiff's present rights depend."

As to Restitution.

If it be suggested that a writ of restitution could not accompany an order of reversal in this case because the United States is defendant in error, the force of that suggestion may well be doubted in view of Sec. 3220, Title 35, Chap. 2, R. S., which provides in part as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, *all penalties collected without authority,* and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant,

assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty."

Now since the amount of the penalty and costs adjudged against him under Section 11 of the Oleomargarine Law and paid by him after the filing of the mandate of this court was paid over by the Clerk of the District Court to the Collector of Internal Revenue for the First District of Illinois and by him remitted to the Commissioner of Internal Revenue, it would seem not improper in the event of a rehearing and reversal that a writ of restitution issue against one or both of those officers requiring them to do what the statute authorizes, namely,—to pay back the penalty and costs. But if such a writ could not issue against those officers, the path to relief for the plaintiff in error in case of reversal is pointed out in *Ex parte Morris & Johnson,* 9 Wallace, 605.

In that case the United States had filed an information in the District Court for the Middle District of Alabama against certain bales of cotton which it was alleged were liable to seizure and confiscation and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. On appeal this court reversed the judgment and remanded the cause with direction to the District Court "to cause restitution to be made to the appellants of whatever they had been compelled to pay under that decree." (*Morris & Johnson* v. *U. S.,* 7 Wall., 578.) And a mandate to this effect was sent to the District Court, and proceedings were instituted to enforce the order of restitution.

The marshal answered that the money had been distributed in accordance with the decree and that he had deposited the residue pursuant to instructions from the Interior Department in the First National Bank of Selma. After stating the facts, the court, speaking by Mr. Justice Swayne, said:

> "Under these circumstances the District Judge was at a loss how to execute the mandate heretofore sent to him and submits himself to this court for further instructions.
>
> The duty of the District Court is simple and obvious and its power ample. The mandate of this court must be obeyed as far as practicable. All the distributees within reach of the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they have received. If they fail to do so, they should be dealt with promptly by attachment for contempt. This will in nowise interfere with any other

remedy to which the petitioners may be entitled except that they cannot be paid twice. * * * The circumstances of the marshal's deposit should be inquired into. If the money in question was deposited in the bank of Selma, pursuant to instructions from the proper authority, he is exonerated. In that event the proper certificate should be given by the court to the petitioners and they must be left to seek redress in the appropriate manner. The court has no authority to order the United States to refund."

So in this case if it were held that a writ of restitution could not issue, the lower court, pursuant to the mandate from this court, in case of reversal, could give the "proper certificate" to the plaintiff in error. He thereupon would "be left to seek redress in the appropriate manner." And the appropriate manner would be first to appeal to the Commissioner of Internal Revenue for a refund under section 3220 of the R. S., and if that appeal were denied (as is scarcely to be imagined would occur after a reversal by this court), then to bring suit either against the United States as authorized by statute, or against the Collector or Commissioner of Internal Revenue, or both of them, as the plaintiff in error might then be advised.

So complete and sufficient is the court's power to require restitution to the plaintiff in error upon the reversal of an erroneous judgment, that even where the judgment or decree in the lower court has been reversed because of an entire lack of jurisdiction, the court may make and enforce such orders as are necessary to restore to the plaintiff in error any money or advantage taken from him under such erroneous judgment or decree.

Northwestern Fuel Co. v. *Brock*, 139 U. S., 216.
Morris' Cotton, 8 Wall., 507.

The cases relied upon by the Solicitor-General while they clearly announce the established doctrine that this court is not empowered to declare itself upon merely moot questions, do not seem in the least to support the claim that the payment by plaintiff in error after the filing of this court's mandate in the lower court has left only a moot question in this case.

In *Kimball* v. *Kimball*, 174 U. S., 158, the plaintiff in error claimed to be the widow of Edward C. Kimball, deceased, and as such to be entitled to appointment as administratrix of his estate, which *was then supposed* to be intestate. The issue concerned only the right of administration. Before the

hearing of the writ of error in this court a will of the deceased was discovered and admitted to probate, letters testamentary were issued by the Surrogate Court to the executrices named in the will and the former letters of administration issued to the mother and brother of the decedent were revoked. As this court said (p. 162):

> "The decree admitting the will to probate, in terms, revoked the former letters of administration, and, by its legal effect, superseded the necessity and the possibility of granting any letters of adminstration, as of an intestate estate, to the petitioner or to any one else."

Under these circumstances no possible action of this court on the writ of error could have been carried into effect and therefore the writ of error was dismissed.

In *Tyler* v. *Judges of the Court of Registration,* 179 U. S., 405, the writ of error was dismissed because it did not appear by the record either that the plaintiff in error was a party to, or that his property was in any way affected by, the proceedings before the Judges of the Court of Registration against whom he had sought to obtain from the Supreme Judicial Court of Massachusetts a writ of prohibition to prevent the Court of Registration from proceeding under the Torrens Law to register a certain parcel of land which adjoined another parcel owned by the plaintiff in error.

Hatfield v. *King,* 184 U. S., 162, was a suit by appellee to quiet title to certain lands. No process had been served or issued but counsel's appearance had been entered *without authority* for the defendants, who appealed from the decree entered against them. This court remanded the case to the Circuit Court "with instructions to set aside the decree as well as the appearance of defendants and to proceed thereafter in accordance with law; and also to make a full investigation in such manner as shall seem to it best of the various charges of misconduct presented in the motion filed in this court, and to take such action thereon as justice may require."

California v. *San Pablo & Tulare Railroad, supra,* was a suit by the state against the railroad company to recover sums claimed to be due for taxes. Pending the writ of error brought by the state to reverse the judgment rendered in favor of the railroad company the latter voluntarily (there being no judgment against it) paid the taxes. Under these circumstances

this court dismissed the writ of error, saying among other things:

> "The state has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it."

In *Mills* v. *Green*, 159 U. S., 651, 657, in dismissing the appeal, the court speaking by Mr. Justice Gray said:

> "In the case at bar the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill, that date had passed; and before the entry of the appeal in this court the convention had assembled pursuant to the statute of South Carolina of 1894, by which the convention had been called. * * *
>
> It is obvious, therefore, that even if the bill could propperly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted."

The latter two cases, while not cited by the Solicitor-General, are here briefly referred to because extensively quoted from by the court in *Kimball* v. *Kimball*, which is the case chiefly relied upon by the Solicitor-General.

It is respectively submitted that the Solicitor-General's "suggestion respecting the petition for rehearing" gives no adequate reason why this court should not consider the petition for rehearing on its merits and allow a rehearing if the court is now in doubt as to the correctness of its decision announced early this term.

Respectfully submitted,

JOHN MAYNARD HARLAN,

Attorney and Counsel for Plaintiff in Error.